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Supreme Court, U.S.
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Nos. 97-1382, 97-1386 and 97-1410

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1997

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DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL, SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE (HOWELL) FROESE; and, CRAIG A. THOMPSON; DEBORAH GUARAGNA-WILLIAMS, and related parties,
*Petitioners,*

v.

GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), governed the admissibility of the scientific evidence in this diversity case and properly applied those standards?

2. Whether the court of appeals could and properly did apply amendments to the Federal Rules of Civil Procedure to a then-pending case as expressly authorized by the Rules and the enacting Order of this Court?

## LIST OF PARTIES

Petitioners in No. 97-1382 are David Schudel, Daniel Glass, Timothy Schudel, Sandra Schudel, Kathrene Rae Howell Thompson Froese, and Craig Thompson [hereinafter, collectively, "Schudel"] and Deborah Guaranga Williams [hereinafter, "Williams"]. Schudel was plaintiff in the district court and appellant in the court of appeals. Williams was plaintiff in the district court and appellee in the court of appeals.

Petitioners in No. 97-1386 are Ruth Hopkins and John Hopkins [hereinafter, jointly, "Hopkins"]. Hopkins incorrectly identifies himself as having been appellee in the court of appeals. (Hopkins Pet. at iii.) Hopkins, plaintiff in the district court, was appellant in the court of appeals.

Petitioner in No. 97-1410 is Merlin E. Carlson, Jr. [hereinafter, "Carlson"]. Carlson was plaintiff in the district court and appellant in the court of appeals.

Respondents are the General Electric Company and Kaiser Aluminum and Chemical Corporation [hereinafter, jointly, "General Electric"]. Petitioners incorrectly identified one of the Respondents as Kaiser Aluminum and Chemical Corporation/Kaiser Aluminum Corporation (Hopkins Pet. at iii; Schudel/Williams Pet. at ii.) Kaiser Aluminum Corporation is not and has not been a party to the proceeding.

## RULE 29.6 LIST

The General Electric Company is a publicly held corporation with no parent companies. Its nonwholly owned subsidiaries are CAMCO, Inc. (Canada); Credit Del'Est; Finax FS AB; Finax KK AB; Gate Finance Corporation; GE Capital Aviation Services, Ltd; GE Capital Mortgage Services, Inc.; GE Capital (NZ) Ltd. (New Zealand); GE Capital PTY LTD. (Australia); GECC Financial Corporation (Hawaii); General Electric Capital Canada, Inc.; General Electric Capital Corporation; General Electric Capital Services, Inc.; General Electric Credit International, N.V.; GNA Corporation; Imaging Financial Services, Inc.; International GE Capital Corporation; Mercur Bank (Austria); Montgomery Ward & Company, Inc.; Outlet Broadcasting, Inc.; and Service Bank GmbH.

Kaiser Aluminum and Chemical Corporation is a wholly owned subsidiary of Kaiser Aluminum Corporation. Maxxam, Inc. is, in turn, the parent of Kaiser Aluminum Corporation. Kaiser Aluminum and Chemical Corporation has no nonwholly owned subsidiaries.

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IN THE

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DAVID SCHUDEL; DANIEL GLASS; TIMOTHY SCHUDEL, SANDRA SCHUDEL, husband and wife, and the marital community composed thereof; KATHRENE RAE (HOWELL) FROESE; and, CRAIG A. THOMPSON; DEBORAH GUARAGNA-WILLIAMS, and related parties,

*Petitioners,*

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GENERAL ELECTRIC CO., a foreign corporation; KAISER ALUMINUM AND CHEMICAL CORPORATION, a foreign corporation,

*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## RESPONDENTS' BRIEF IN OPPOSITION

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### OPINIONS BELOW

The unanimous opinion of the court of appeals is published at 120 F.3d 991 (CA9 1997) and is reproduced in its entirety in each of Petitioners' Appendices. (Schudel/Williams Pet. App. at 1-15; Hopkins Pet. App. at 1-15; Carlson Pet. App. at A-1-A-15.) The opinion of the district court is unpublished and is reproduced in its entirety in the Schudel/Williams Appendix and the Carlson Appendix, and approximately ten of its 43 pages are reproduced in the Hopkins Appendix. (Schudel/Williams Pet.

App. at 19-61; Carlson Pet. App. at A-16-A-44; Hopkins Pet. App. at 19-28.) [Hereinafter, for the Court's convenience, all Appendix citations ("Pet. App.") refer to the Schudel/Williams Appendix.]

## JURISDICTION

The court of appeals held that it lacked jurisdiction to review the district court's post-trial rulings and subsequent grant of a new trial as to Carlson, Hopkins, and one of the Schudel plaintiffs (Froese). The court of appeals dismissed their appeals. (Pet. App. at 15.)

The court of appeals exercised its jurisdiction to review the district court's post-trial rulings and subsequent grant of judgment against the remaining Schudel plaintiffs. The court of appeals reversed those judgments, reversed the denial of General Electric's alternative motion for new trials, and remanded. (Pet. App. at 15.)

The court of appeals exercised its jurisdiction to review the judgment entered on the jury verdict in favor of Williams. The court of appeals found Williams' expert testimony on causation inadmissible, vacated her judgment, reversed the denial of General Electric's motion for new trial, and remanded. (Pet. App. at 15.)

No party has a judgment at this time. This Court may accept a writ of certiorari to review the various rulings of the court of appeals pursuant to 28 U.S.C. § 1254(1) (1998).

## STATEMENT OF THE CASE

In the fall of 1988, Kaiser Aluminum and Chemical Corporation contracted with the General Electric Company to strip polychlorinated biphenyls ("PCBs") from five utility rooms in Kaiser's Trentwood facility outside of Spokane, Washington. The bulk of the work was manual labor—scraping and scrubbing down walls and pipes with detergents and solvent degreasers which would adsorb the PCBs. The job lasted about eight weeks. In this diversity

case, nine plaintiffs (petitioners here) alleged they developed myriad neurological and respiratory problems from working with those detergents and solvents.[1]

**A. District Court Proceedings**

Several months before trial, General Electric filed extensive pre-trial motions, including challenges to the admissibility of certain scientific evidence in accordance with Federal Rules of Evidence 104(a) and 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). General Electric challenged in particular the soundness and scientific reliability of, and the methodology employed by plaintiffs' experts in reaching, the unprecedented opinion that plaintiffs collectively suffered from disabling solvent-induced encephalopathy, *i.e.*, diffuse brain damage, secondary to brief occupational exposures to products containing the solvents trichloroethane ("TCA") and perchloroethylene ("Perc").

Although it never held the "*Daubert* hearing" requested by all parties, the district court eventually ruled that a "question of fact" existed as to whether, and how, plaintiffs had been neurologically injured by solvents. The court made no findings at any time as to whether, or how, the methodology underlying plaintiffs' experts' theories of causation rose to the level of "scientific knowledge" required by *Daubert* in the absence of any accepted methodology or supporting literature.

At trial, plaintiffs' expert witnesses testified over General Electric's objections that plaintiffs as a group had suffered "brain damage" and other neurological injuries ranging from "toxic encephalopathy" to "whole person

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[1] The personal injury claims included headache, rash, bone pain, overall body pain, fatigue, Pavlovian responses to odors, memory loss, upper respiratory infections, Reactive Airways Dysfunction Syndrome, brain dysfunction, alterations in consciousness, and other ailments. (Pet. App. at 24-51.) The tenth plaintiff-petitioner asserted a loss consortium claim. (Pet. App. at 69-70.)

aggravation." [2] This testimony was allowed, and was considered by the jury, although as the court of appeals ultimately found, it had no scientific basis:

- Plaintiffs' experts "conceded that only five organic solvents, none of which were involved in this case, had been proven to be neurotoxic." (Pet. App. at 13.) Plaintiffs' experts further "admitted that medical science has not determined the effects of short-term exposure to the solvents involved." (Pet. App. at 14.)

- Plaintiffs' experts admitted that "it would be improper to draw conclusions as to the toxicity of TCA and Perc based on the toxicity of other solvents." (Pet. App. at 13.) Certainly, these experts "did not establish it was scientifically acceptable to draw general conclusions about the neurotoxicity of TCA and Perc from studies of other chemicals; indeed the testimony indicated small differences in molecular structure often have significant consequences." (Pet. App. at 12.)

- Plaintiffs' experts acknowledged—inapposite to the facts of the case—"that repeated exposure to nonpersistent toxins such as organic solvents over a long period must be documented to establish a causal relationship." (Pet. App. at 13.)

- Plaintiffs' experts found no relevant or reliable data on TCA or Perc on which to rely. (Pet. App. at 13-15.) To the extent the experts referred to any scientific data at all, "[e]xtrapolation was necessary to make the studies relevant, and there was no showing that the necessary extrapolation was scientifically acceptable." (Pet. App. at 13.)

- One of the plaintiffs' experts testified only to "possibilities" rather than "probabilities." (Pet. App. at 14; *see also* Pet. App. at 24-51 (district court opin-

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[2] Hopkins suggests that he offered "[u]nchallenged trial testimony" with respect to his "severe" injuries. (Hopkins Pet. at 5.) The assertion is acutely wrong but is irrelevant to the writ.

ion).) In the alternative, after she "admitted she could not testify to a specific cause and effect relationship," she "relied instead on a 'whole person aggravation' theory without establishing that the theory had a scientific basis." (Pet. App. at 14.)

At the end of the trial, and largely because of what the district court described as "plaintiffs' choice of tactics" in unfairly and improperly presenting their causation case (Pet. App. at 52), verdicts were returned in favor of all plaintiffs. Thus, when General Electric timely filed post-trial motions, including a second renewed motion for judgment as a matter of law and a motion for a new trial, both supported with extensive memoranda, the district court granted General Electric substantial relief: the court concluded (1) that five plaintiffs had failed to present any expert evidence which was scientifically sound or causally sufficient and therefore entered judgment as a matter of law in favor of General Electric on those plaintiffs' claims; and (2) that four plaintiffs presented claims which were inexorably contaminated with unscientific and/or insupportable expert opinion and therefore granted General Electric a new trial on those plaintiffs' claims.[3] (Pet. App. at 24-52, 60.) Only Williams' verdict was not disturbed. (Pet. App. 43, 53, 60.) In its order, the district court also rejected the argument of Schudel and Hopkins that General Electric had improperly served its post-trial motions upon them because General Electric had mailed the motions by Federal Express rather than by postal delivery. (Pet. App. at 19-21.)

On cross-motions of the parties, the trial court certified as final the judgments entered on the claims of the six

[3] Carlson incorrectly asserts that the district court ruled pursuant to Federal Rule of Civil Procedure 59(d) (motion on court's initiative). (Carlson Pet. at 8, 22-24.) The record is to the contrary, as the court of appeals held: "The district court ordered a new trial under Rule 50(b)." (Pet. App. at 7 n.9.) *See also* Schudel Pet. at 4 ("trial court did not act under its Rule 59(d) authority").

plaintiffs whose cases were fully disposed of, *i.e.*, the five plaintiffs against whom judgment was entered and the one plaintiff in whose favor judgment was entered. (Pet. App. at 71-74.) The court declined to enter final judgment on any claim with respect to the four "new trial" plaintiffs. (Pet. App. at 73.)

**B. Court of Appeals Proceedings**

On January 24, 1995, General Electric timely noticed its appeal from the judgment entered in favor of Williams. All plaintiffs other than Williams cross-appealed by notice dated February 7, 1995.

In addressing General Electric's substantive appeal with respect to Williams, the court of appeals properly focused on *Daubert*: "Scientific knowledge is reliable if it is 'ground[ed] in the methods and procedures of science' and 'connotes more than subjective belief or unsupported speculation.' " (Pet. App. at 10-11 (quoting *Daubert*, 509 U.S. at 590).) "In determining reliability, '[t]he focus . . . must be solely on principles and methodology, not on the conclusions that they generate.' " (Pet. App. at 11 (quoting *Daubert*, 509 U.S. at 595).)

The court of appeals then correctly determined that the district court had erred in allowing the testimony of Williams' experts, who had made "no showing" that their methods were scientifically sound. (Pet. App. at 13.) Thus, the principles and methodology underlying Williams' experts' opinions "did not meet *Daubert's* requirement of reliability." (Pet. App. at 12, 12-15.)[4] The court of appeals also properly concluded that "[a]dmission of the challenged evidence was prejudicial . . . because it was the sole causation evidence with respect to Williams' neurological symptoms." (Pet. App. at 14.) The court of appeals therefore vacated the judgment entered on the

[4] The court of appeals found that one of Williams' experts in fact failed to meet *both* the reliability *and* the relevance prongs of *Daubert*. (Pet. App. at 14.)

jury verdict in Williams' favor and remanded for a new trial which will address the other (non-neurological) injuries Williams claimed. (Pet. App. at 15.)

In addressing Schudel's substantive appeal (with respect to those plaintiffs against whom judgment had been entered on General Electric's post-trial motions), the court of appeals found that the district court "properly concluded that [Schudel's expert's] testimony based on the 'whole person aggravation' theory of causation did not meet the standard of *Daubert* . . . and should have been excluded." (Pet. App. at 9.) The court of appeals found prejudicial error, however, in the *timing* of such exclusion. Because the jury had rendered its verdict based on the improperly admitted evidence, the court of appeals found that the district court no longer had discretion to grant judgment as a matter of law in favor of General Electric and was instead restricted to ordering a new trial. (Pet. App. at 8-10.) The court of appeals therefore reversed the grant of judgment as matter of law in favor of General Electric and remanded. (Pet. App. at 10, 15.)

The Ninth Circuit dismissed the appeals of those plaintiffs who were subject to the district court's new trial order and whose only reviewable issue was a procedural objection to service by Federal Express. (Pet. App. at 4-7, 15.)[5] Although disagreeing with the district court's finding that Federal Express service was the equivalent of service by mail, the court of appeals found the issue moot in light of amendments to the Federal Rules of Civil Procedure which made clear that the timely filing of post-trial motions rather than the method or date of service preserved a party's right to post-trial review. (Pet. App. at 4-5.) The court of appeals did not conclude that

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[5] The court of appeals' procedural ruling applied to nine of the plaintiffs. Six of those plaintiffs also were parties to the merits-appeals which the court of appeals went on to consider. *See infra*, text at 6-7.

service was in fact untimely or address any of General Electric's alternative arguments on service, and it did not need to do so.

The court of appeals also dismissed the appeal of plaintiff Carlson, who was subject to the new trial order and presented no reviewable issue. (Pet. App. at 5-7, 15.)[6]

In light of the remands, all parties are now before the district court. The district court will conduct new trials with respect to those plaintiffs who had both sufficient (*i.e.* more-probable-than-not) and admissible evidence of injury consistent with the rulings of the court of appeals and with those rulings of the district court which were not disturbed on appeal.

## SUMMARY OF ARGUMENT

Petitioners bring two primary arguments to the Court. Neither warrants the Court's exercise of its extraordinary and discretionary *certiorari* jurisdiction.

First, petitioners take issue with the application of *Daubert* in this case. Contrary to their assertions, *Daubert* does apply to diversity cases, and the court of appeals

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[6] Carlson and Hopkins argue that it was a "departure from usual and accepted judicial procedure, justifying this Court's exercise of its supervisory powers," for the court of appeals to decline to rule on the merits of their appeals. (Hopkins Pet. at 25-29; *see* Carlson Pet. at 24-25.) Carlson and Hopkins also each advance here their positions on the merits of those issues they claim the court of appeals should have reached, but did not. (For example, Carlson argues that the district court "*sua sponte* resurrected subissues that both parties and the court had earlier waived under [Federal Rule of Civil Procedure] 49(a)." (Carlson Pet. at 22.) Similarly, Hopkins argues that General Electric "failed to preserve any issue relative to the jury instructions." (Hopkins Pet. at 28-29.)) It is settled law that the courts of appeal have general jurisdiction only over final judgments and that orders granting new trials are interlocutory and not immediately appealable. *E.g.*, 28 U.S.C. § 1291 (1998); *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). General Electric does not otherwise address these arguments in its opposition.

(like all of its sister circuits) required of petitioners exactly what *Daubert* itself requires—that they make some logical showing that their experts' opinions were grounded in good science. The court of appeals correctly reviewed the district court's rulings and correctly concluded that petitioners had made "no showing" of reliability. Petitioners' disagreement with the court of appeals' conclusion does not rise to the level of a *certiorari* concern.

Second, petitioners object to the court of appeals' discretionary determination that it would apply the amendments to the Federal Rules of Civil Procedure to this case, which was pending at the time of the amendments. Petitioners' arguments ignore this Court's instructions to the federal courts in this regard: the amendments "shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." Order of the Supreme Court of the United States Adopting and Amending the Federal Rules of Civil Procedure (April 27, 1995), *reprinted in* 161 F.R.D. 149 (1995). Petitioners' arguments also ignore the entirely uniform application of this Court's Order in dozens of decisions of the federal courts of appeals, including the decision below. No new or important issue was decided by the court of appeals, and no *certiorari* considerations are implicated by the court of appeals' decision.

## REASONS FOR DENYING THE WRIT

### I. THE DECISION BELOW RAISED NO NEW ISSUE, MUCH LESS A COMPELLING ISSUE, WITH RESPECT TO *DAUBERT* AND PROPERLY HELD THAT *DAUBERT* APPLIED TO A DIVERSITY CASE PENDING IN FEDERAL COURT.

Petitioners Williams and Carlson contend that the district court, or the court of appeals, or both, erred in applying *Daubert* under the facts of this case. The decisions below did not raise any new issue, much less a

compelling issue justifying the exercise of this Court's *certiorari* jurisdiction, with respect to *Daubert*.

1. Carlson argues that the *Erie* Doctrine dictates that evidence need not be admissible under *Daubert* so long as the evidence is of the type which may be "sufficient" to sustain a judgment under state substantive law. (Carlson Pet. at 13-15 (citing *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938).) His position is wrong. The Federal Rules of Evidence, including Rule 702 and hence *Daubert*, as a general matter govern the admissibility of all evidence in all cases—including diversity cases—in federal courts. If a Federal Rule of Evidence covers a point in dispute, Congress has mandated that such Rule be followed. *See* Fed. R. Evid. 101. Thus, in *Daubert*, itself a diversity case from California, this Court stated that because it was basing its decision "on the content of the congressionally-enacted Federal Rules of Evidence," it did not need to address the *Erie* Doctrine. 509 U.S. at 589 n.6.[7] *See also, e.g., Stutzman v. CRST, Inc.*, 997 F.2d 291, 295 (CA7 1993) ("We hold that the Federal Rules of Evidence govern the admissibility of expert testimony in federal diversity cases."); *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1054 (CA4 1986) (same); *Dawsey v. Olin Corp.*, 782 F.2d 1254 (CA5 1986) (same).

Moreover, Carlson misstates the facts when he asserts that the federal courts cannot apply *Daubert* in a manner consistent with Washington state law. (Carlson Pet. at 9-17.) The *Schudel* court specifically referred to the Washington state sufficiency standard in addressing the relevance prong of *Daubert*. (Pet. App. at 11.) The *Schudel* court properly held:

> A court's determination of relevance must consider the applicable substantive standard. Under Wash-

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[7] When *Daubert* was issued, California state courts applied (and even now still apply) the entirely different admissibility standards of *Kelly/Frye*. *E.g., People v. Leahy*, 8 Cal. 4th 587, 597-604, 882 P.2d 321, 323 (1994) (citing *Frye v. United States*, 293 F. 1013 (CADC 1923)).

> ington tort law, a plaintiff must show that "the act complained of 'probably' or 'more likely than not' caused the subsequent disability." *O'Donoghue v. Riggs*, 73 Wash. 2d 814, [824], 440 P.2d 823, 830 (1968). . . . Under this standard, we held in *Daubert II* that expert testimony offered to prove causation did not satisfy the relevance requirement because the evidence suggested only that use of the drug at issue "could *possibly* have caused plaintiffs' injuries," rather than "more likely than not" caused the injuries. . . .

(Pet. App. at 11 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1320-22 (CA9 1995) (*Daubert II*) (emphasis in original).) The district court had properly identified the same standard. (Pet. App. at 46 (quoting *O'Donoghue*, 73 Wash. 2d at 824, 440 P.2d at 830) (a "might have" or "possibly did" opinion is "nothing more than conjecture").)

2. If *Daubert* applies, which of course it does, Carlson and Williams alternatively seek clarification as to whether *Daubert* should be read to accept more expert witness opinions, or fewer. (Carlson Pet. at 10-13; Williams Pet. at 18-19.) This results-oriented equation mocks the purpose of the *Daubert* inquiry. *Daubert* and its progeny direct the court's focus to the quality, not the quantity, of expert opinion that is admissible under Federal Rule of Evidence 702. The burden on the trial court is to conduct a highly fact-bound, flexible inquiry as to the reliability and relevance of the testimony. *Daubert*, 509 U.S. at 592-95; *General Electric v. Joiner*, 118 S. Ct. 512, 139 L. Ed. 2d 508, 517-18 (1997). This exercise assuredly sometimes results in the admission of opinion evidence and sometimes results in the exclusion of such evidence. That different facts compel different results suggests only that the federal courts are heeding the directive of this Court to act as a case-specific "gatekeeper" in evaluating each time whether scientific opinion evidence "is connected to existing data only by the *ipse dixit* of the expert." *Joiner*, 139 L. Ed. 2d at 519.

3. Williams argues that in this particular case the court of appeals went too far in assuring scientific reliability, but she mischaracterizes the court of appeals' reasoning in rejecting the testimony of her experts. In particular, it is simply wrong to claim, as Williams does, that there was "insistence by the Ninth Circuit opinion below that there be peer-reviewed (specific to the chemical and dosage) literature." (Williams Pet. at 27; *see also* Williams Pet. at 26 (accusing court of appeals of adopting "concept that peer-reviewed studies of the specific organic solvents used at the precise dosages are the only relevant method of evaluating scientific reliability").) Rather, the court of appeals found a complete lack of evidence that the testimony was grounded in good science: "Extrapolation was necessary to make the studies relevant, and *there was no showing that the necessary extrapolation was scientifically acceptable.*" (Pet. App. at 13 (emphasis added).) Such analysis was neither unusual nor improper; to the contrary, it reflected exactly the nature of the inquiry undertaken in every circuit that has had the opportunity to apply *Daubert* in the context of novel medical causation opinion testimony. *E.g.*, *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107-08 (CA8 1996) (analytical gap in opinion failed *Daubert* standards because it improperly left jury to speculate about whether exposure was sufficient to cause injury); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (CA7 1996) ("[w]e are baffled" by expert's failure to make "elementary distinction[s]" regarding exposure and dose); *Daubert II*, 43 F.3d at 1315-1316, 1319 (bald assurances of reliability fail *Daubert* test); *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 614 (CA7 1993) ("[i]f experts cannot tie their assessments of data to known scientific conclusions, based on research or studies, then there is no comparison for the jury to evaluate and the experts' testimony is not helpful to the jury," and so such testimony is inadmissible under *Daubert*).

4. Williams complains that the court of appeals' opinion "fails to identify what standard of appellate review is

being undertaken," and she concurrently insists that the court must have applied an improper one. (Williams Pet. at 20.) Her argument is not supported by the record.

a. First, the standard of review was not disputed by any party to the appeal. Both Williams and General Electric requested abuse of discretion review on evidentiary matters, an unsurprising request given that the Ninth Circuit had expressly adopted and consistently applied this standard—not only on the admission of expert testimony in general but also on *Daubert* issues in particular —well before the opinion issued here. *See Lust v. Merrell Dow Pharms., Inc.*, 89 F.3d 594, 596 (CA9 1996) (abuse of discretion standard applies to decision to admit expert testimony under Fed. R. Evid. 702 and *Daubert*); *Daubert II*, 43 F.3d at 1315 (same); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1123 (CA9 1994) (same); *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 500 (CA9 1994) (same, phrased as "manifestly erroneous"); *United States v. Rincon*, 28 F.3d 921, 923 (CA9 1994) (same); *see also, e.g., United States v. Amador-Galvan*, 9 F.3d 1414, 1417 (CA9 1993) (abuse of discretion review applies to rulings on admissibility of expert testimony) (pre-*Daubert*); *United States v. Rahm*, 993 F.2d 1405, 1409-10 (CA9 1993) (same) (citing cases). There is simply no reason to believe that the court of appeals unilaterally and *sub silentio* selected a different standard uniquely for this case.

b. Second, in the first part of its opinion addressing General Electric's appeal, the Ninth Circuit explicitly upheld the district court as properly having "acted within its discretion" in allowing Williams' experts to base their opinions on certain data. (Pet. App. at 12.) Williams fails even to acknowledge this point and cannot reconcile it with her assertions. It is absurd to suppose (and to seek *certiorari* on the supposition) that the court of appeals employed a different standard depending on which aspect of the experts' opinions was under review.

c. Certainly there is no confusion within the Ninth Circuit as to the standard of review that the *Schudel* court applied. In its most recent writing on the subject, the Ninth Circuit has summarized the *Schudel* holding thus: "district court *abused its discretion* in admitting expert testimony when witness 'could not testify to a specific cause and effect relationship . . . between exposure and health problems.' " *Cabrerra v. Cordis Corp.*, 134 F.3d 1418, ——, 1998 U.S. App. LEXIS 1245, *13 (CA9 1998) (citing *Schudel*, 120 F.3d at 997) (ellipsis in original; emphasis added).

d. Finally, Williams' accusations about what the court of appeals "ignored" are grossly speculative. The record on appeal was extensive and included trial testimony, voir dire, affidavits and offers of proof prepared by counsel —all appropriate to the question of whether the district court had abused its discretion. (Williams nevertheless proposes, without basis, that the court of appeals relied "upon the trial testimony of the experts alone, without consideration of the underpinnings set forth in the totality of the Offers of Proof. . . ." Williams Pet. at 23.) But "scientific knowledge" under *Daubert* is not judged by the volume of submissions. The reality is, despite the extensive record on appeal, the court of appeals correctly concluded "there was *no showing*" of scientific reliability. (Pet. App. at 13 (emphasis added).) Such a finding explicitly supports the conclusion that the district court abused its discretion in permitting the opinion testimony. *See, e.g., Wright*, 91 F.3d at 1107-08 (in circumstances closely similar to those in *Schudel*, reversing judgment entered on jury verdict; expert's opinion was "simply speculation" and was therefore inadmissible under *Daubert*) ("a plaintiff in a toxic tort case must prove the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance before he or she may recover"); *Daubert II*, 43 F.3d at 1319 ("experts' un-

adorned assertions" with no showing of scientific reliability are *per se* inadmissible); *see also, e.g., Rosen,* 78 F.3d at 319 (noting lack of "any experimental, statistical, or other scientific data from which such a causal relation might be inferred or which might be used to test a hypothesis founded on theory"); *Mid-State Fertilizer Co. v. Exchange Nat'l Bank,* 877 F.2d 1333, 1339 (CA7 1989) ("an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process") (pre-*Daubert*).

5. In sum, Carlson's and Williams' *Daubert*-based arguments do not warrant the Court's exercise of its extraordinary and discretionary jurisdiction. The unanimous decision of the court of appeals does not conflict with any decision of this Court or any decision of any other court of appeals. Nor do the petitions present an important issue of law which needs to be addressed by this Court. Carlson and Williams simply seek reconsideration of the standards for the admissibility of expert testimony set forth five years ago in *Daubert* and affirmed this Term in *Joiner*.

## II. THE DECISION BELOW IS FULLY CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS, WHICH HAVE READILY AND UNIFORMLY ACTED WITHIN THEIR DISCRETION IN APPLYING AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE TO A THEN-PENDING CASE IN ACCORDANCE WITH THE EXPRESS INSTRUCTIONS OF THIS COURT.

When General Electric timely filed its post-trial motions, it served copies on certain counsel by hand-delivery and other counsel by Federal Express. Schudel, Williams and Hopkins (collectively, "Schudel" for purposes of this discussion) argue that the motions were technically invalid because they were entitled to receive their service copies by postal delivery rather than by Federal Express delivery. The court of appeals correctly found that Schudel's argu-

ment was moot: amended Federal Rules of Civil Procedure 50 and 59 make clear that the validity of post-trial motions is judged by the date of filing rather than the date or type of service. *See, e.g.*, Fed. R. Civ. P. 50(b) (renew motion for judgment as a matter of law by "filing" within "10 days after entry of judgment"); Fed. R. Civ. P. 59 (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). The ruling was unremarkable and invoked no new or compelling issues of law.

1. This Court has ordered that the 1995 amendments to the Federal Rules of Civil Procedure "shall govern all proceedings in civil cases thereafter commenced and, *insofar as just and practicable, all proceedings in civil cases then pending*." Order of the Supreme Court of the United States Adopting and Amending the Federal Rules of Civil Procedure (April 27, 1995), *reprinted in* 161 F.R.D. 149 (1995) (emphasis added). The court of appeals determined that it was just and practicable and so applied the Federal Rules as amended to this case, which was pending at the time of the amendments.

2. As would be expected given to the express language of the Court's order amending the Rules, there is no conflict among the circuit courts as to whether the amendments may apply to matters pending at the time of the amendments. Instead, "courts interpreting these effective dates provisos consistently have held that when it is 'just and practicable,' new Federal Rules may apply to a particular pending case." *United States v. Roberts*, 88 F.3d 872, 878 (CA10 1996) (citations omitted). In consequence, courts in every circuit have exercised proper discretion and applied the amended rules (or not) after considering whether it was factually appropriate, *i.e.*, "just and practicable," in a broad array of cases: [8]

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[8] This Court has issued similar Orders in various amendments to the Federal Rules of Civil Procedure, the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. *E.g.*, Order of April

*District of Columbia Circuit*: *Barbour v. Merrill*, 48 F.3d 1270 (CADC 1995) (applying 1993 amendments to Fed. R. App. P. 3(c) to case pending on appeal at time of amendment because just and practicable); *Bayer v. United States Dep't of Treasury*, 956 F.2d 330, 334-35 (CADC 1992) (applying 1991 amendments to Fed. R. Civ. P. 15(c) to case pending on appeal at time of amendment because "unquestionably" just and practicable).

*First Circuit*: *Silva v. Witschen*, 19 F.3d 725, 727-28 (CA1 1994) (declining to apply 1993 amendments to Fed. R. Civ. P. 11 under facts of case because infeasible and would work injustice); *Freund v. Fleetwood Enters., Inc.*, 956 F.2d 354, 363 (CA1 1992) (declining to apply amended Fed. R. Civ. P. 15 under facts of case because would be "manifest injustice").

*Second Circuit*: *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 468 (CA2 1995) (in *dicta*, noting option to remand to district court for "determination of whether applying the [1991] amended version [of Fed. R. Civ. P. 15(c)] would be 'just and practicable' "), *modified on other grounds*, 74 F.3d 1366 (CA2 1996).

*Third Circuit*: *MCI Telecoms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1091 (CA3 1995) (applying 1993 amendments to Fed. R. Civ. P. 4 to case pending at time of amendment because just and practicable); *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298 (CA3 1995) (same).

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22, 1993, *reprinted in* 146 F.R.D. 404 (1993); Order of April 30, 1991, *reprinted in* 134 F.R.D. 495 (1991). The illustrative cases in the text arose under these various Orders. By way of contrast, certain Rule amendments may be limited so as *not* to apply to pending cases. *See, e.g.*, Pub. L. No. 104-208, Div. A, Title I, § 101(a) (1996) (amendments to Fed. R. Evid. 413 applicable only to "proceedings commenced on or after the effective date of the amendments, including all trials commenced on or after the effective date"); *see generally* 28 U.S.C. § 2074(a) (1997) (granting Supreme Court the discretion to determine applicability of its federal rules amendments to pending cases).

*Fourth Circuit*: *Barber v. Whirlpool Corp.*, 34 F.3d 1268, 1273-74 (CA4 1994) (applying 1993 amendments to Fed. R. App. P. 4 to case pending on appeal at time of amendment because "[n]o injustice would be worked" and applying the amended rule "works to preserve appealability and allows us to reach the merits. . . .").

*Fifth Circuit*: *Long v. Simmons*, 77 F.3d 878, 879 (CA5 1996) (applying 1995 amendments to Fed. R. Civ. P. 59 to case pending on appeal at time of amendment because just and practicable); *United Indus., Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 765-66 & n.8 (CA5 1996) (applying 1993 amendments to Fed. R. Civ. P. 54(d) to case pending at time of amendment because just and practicable); *Elliott v. Tilton*, 64 F.3d 213, 215-16 (CA5 1995) (applying 1993 amendments to Fed. R. Civ. P. 11 to case pending at time of amendment because just and practicable); *Ford v. Elsbury*, 32 F.3d 931, 933-34 (CA5 1994) (applying 1993 amendments to Fed. R. App. P. 3 to case pending on appeal at time of amendment because just and practicable); *Garcia v. Wash*, 20 F.3d 608, 609 (CA5 1994) (same) (application of amendments "prevent[s] the loss of appellate rights"); *Burt v. Ware*, 14 F.3d 256, 257-58 (CA5 1994) (applying 1993 amendments to Fed. R. App. P. 4 to case pending on appeal at time of amendment because just and practicable) ("appellees will not be prejudiced by employment of the new rules; rather they will simply lose a potential 'windfall' of having the appeal dismissed"); *Skoczylas v. Federal Bureau of Prisons*, 961 F.2d 543, 544-46 (CA5 1992) (applying 1991 amendments to Fed. R. Civ. P. 15 to case pending on appeal at time of amendment because just and practicable).

*Sixth Circuit*: *Ridder v. City of Springfield*, 109 F.3d 288 (CA6 1997) (applying 1993 amendments to Fed. R. Civ. P. 11 to case pending at time of amendment because just and practicable); *Ridder v. City of Springfield*, 1997 U.S. App. LEXIS 5118 (CA6 Mar. 13, 1997)

(applying 1993 amendments to Fed. R. Civ. P. 26 to case pending at time of amendment because just and practicable); *Runfola & Assocs. v. Spectrum Reporting II, Inc.*, 88 F.3d 368 (CA6 1996) ("it was within the district court's discretion as to which version of Rule 11 applied"); *Spurlock v. Demby*, 48 F.3d 1219 (Table), 1995 U.S. App. LEXIS 4321 (CA6 1995) (declining to apply 1993 amendments to Fed. R. Civ. P. 11 under facts of case because not just and practicable).

*Seventh Circuit*: *Delgado-Brunet v. Clark*, 93 F.3d 339, 344 (CA7 1996) (applying 1991 amendments to Fed. R. Civ. P. 15(c) to case pending at time of amendment because just and practicable); *In re Generes*, 69 F.3d 821 (CA7 1995) (not just and practicable to apply amended Fed. R. Civ. P. 11 under facts of case); *Cunningham v. Waters Tan & Co.*, 65 F.3d 1351 (CA7 1995) (same); *Cleveland v. Porca Co.*, 38 F.3d 289 (CA7 1994) (applying 1993 amendments to Fed. R. App. P. 3(c) to case pending on appeal at time of amendment because just and practicable); *Land v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund*, 25 F.3d 509 (CA7 1994) (not just and practicable to apply amended Fed. R. Civ. P. 11 under facts of case); *Woods v. Indiana Univ.-Purdue Univ.*, 996 F.2d 880, 885-86 (CA7 1993) ("we honor the Supreme Court's express directive, and we therefore hold that the district court should have determined whether it was 'just and practicable' to determine the parties' rights and obligations under the new version of [Fed. R. Civ. P.] 15(c)").

*Eighth Circuit*: *United States v. Duke*, 50 F.3d 571, 574-76 (CA8 1995) (applying 1993 amendments to Fed. R. App. P. 4 to case pending on appeal at time of amendment because just and practicable).

*Ninth Circuit*: *Schroeder v. McDonald*, 55 F.3d 454, 459-60 (CA9 1995) (applying 1993 amendments to Fed.

R. App. P. 4 to case pending on appeal at time of amendment because just and practicable) ("To allow the parties to proceed to the appeal is just. Further, practicality is no problem."); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 887-88 (CA9 1994) (same); *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F.3d 1498, 1501-02 (CA9 1994) (applying 1991 amendments to Fed. R. Civ. P. 15 to case pending at time of amendment because just and practicable); *Leader Nat'l Ins. Co. v. Industrial Indem. Ins. Co.*, 19 F.3d 444, 445 (CA9 1994) (applying 1993 amendments to Fed. R. App. 4 to case pending on appeal at time of amendment because just and practicable).

*Tenth Circuit*: *United States v. Platero*, 72 F.3d 806, 811 (CA10 1995) (applying 1994 amendments to Fed. R. Evid. 412 to case on remand at time of amendment because just and practicable); *Dahn v. United States*, 77 F.3d 492 (Table), 1996 U.S. App. LEXIS 2801 (CA10 1996) (applying 1993 amendments to Fed. R. Civ. P. 4(m) to case pending at time of amendment because just and practicable); *Espinoza v. United States*, 52 F.3d 838, 840-41 (CA10 1995) (applying 1993 amendments to Fed. R. Civ. P. 4(m) to case pending at time of amendment because just and practicable); *Cole v. Ruidosa Mun. Sch.*, 43 F.3d 1373, 1385-86 (CA10 1994) (applying 1993 amendments to Fed. R. App. P. 3(c) to case pending on appeal at time of amendment because just and practicable); *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs*, 32 F.3d 1436, 1440-41 (CA10 1994) (same); *In re Search of Premises Known as 6455 South Yosemite, Engelwood, Colo.*, 897 F.2d 1549, 1553-54 & n.5 (CA10 1990) (applying 1989 amendments to Fed. R. Crim. P. 41(e) to case pending at time of amendment because just and practicable).

*Eleventh Circuit*: *Chudasama v. Mazda Corp.*, 123 F.3d 1353 (CA11 1997) (applying 1993 amendments to Fed. R. Civ. P. 33(a) to case pending at time of amendment because just and practicable); *Silvious v. Pharaon*,

54 F.3d 697 (CA11 1995) (applying 1993 amendments to Fed. R. Civ. P. 4 to case pending at time of amendment) ("plain language of Supreme Court's Order indicates that court has discretion as to which version of Rule applies); *Narey v. Dean*, 32 F.3d 1521, 1524 (CA11 1994) (applying 1993 amendments to Fed. R. App. P. 4 to case pending at time of amendment because just and practicable) ("it is not an injustice for a party to lose the 'windfall' of having an appeal dismissed" on procedural grounds); *Virgo v. Rivera Beach Assocs.*, 30 F.3d 1350, 1355 n.3 (CA11 1994) (same); *Hill v. United States Postal Serv.*, 961 F.2d 153, 156 (CA11 1992) (applying 1991 amendments to Fed. R. Civ. P. 15(c) to case pending at time of amendment because just and practicable).

3. None of these cases adopts a presumption of applicability of a *per se* rule. Nor did the court of appeals do so in this case. Hopkins' accusation that the court of appeals here found the amendments "automatically retroactive," (Hopkins Pet. at 11), is flatly contradicted by the record. The court specifically considered whether, in this case, the amendments would be just—"no prejudice will result"—and practicable—"no additional action on the part of the court or the parties is required to proceed." (Pet. App. at 5.) As the circuits have explicitly and correctly concluded, "the determination of when it is 'just and practicable' to retroactively apply [a Federal Rule], as amended, is necessarily a case-by-case consideration." *Duke*, 50 F.3d at 575. These cases track the guidance of this Court: "Our orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the posture of a particular case." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 & n.29 (1994).

4. The cases also track "the general purpose of the [federal] Rules," to wit, "to minimize technical obstacles to a determination of the controversy of its merits." *G.F. Co.*, 23 F.3d at 1502 (quoting *United States ex rel. Atkins*

*v. Reiten*, 313 F.2d 673, 675 (CA9 1963)). *See also, e.g., Conley v. Gibson*, 355 U.S. 41, 48 (1957) (Federal Rules support common law goal to "facilitate a proper decision on the merits). The law accepts as "just" that which favors substance over procedure. *E.g., Burt*, 14 F.3d at 257-58 (not injustice to "lose a potential 'windfall' of having the appeal dismissed"); *Narey*, 32 F.3d at 1524 (same).

5. In *Landgraf*, this Court referred to a party's "diminished reliance interests in manners of procedure" while explaining why it had determined that amendments to the Federal Rules may apply to pending cases where just and practicable. 511 U.S. at 275 & n.29. The Court confirmed: "Because rules of procedure regulate secondary rather than primary conduct, the fact a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." 511 U.S. at 275. This case of course fairly illustrates the point—no "primary" conduct is at play in addressing the mechanics of service of timely-filed motions.[9]

6. Accepting the possibility that the amendments may indeed be applied to pending cases, Schudel alternatively argues that the court of appeals improperly exercised its discretion in applying the amendments to this particular case. (Schudel Pet. at 15-18; Hopkins Pet. at 15-20.) Schudel's factual complaints—made for the first time here[10]—pose nothing worthy of review. But *certiorari*

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[9] Although Hopkins proposes that this Court has never addressed the question of whether the amended rules of civil procedure may apply to pending cases (Hopkins Pet. at 14), both the Court's enacting Order and *Landgraf* provide the answer. Thus, there has never been controversy on the point in the federal courts.

[10] Schudel failed to respond in the court below to General Electric's submission pursuant to Federal Rule of Appellate Procedure 28(j) advising the court of appeals of the amendments to the Federal Rules. Schudel likewise failed to respond to General Electric's Supplemental Brief and motion for leave to file same relating to the

considerations aside, and even accepting the factual record as presented in the petitions, General Electric observes that Schudel cites to no genuine infeasibility or injustice that followed application of the amended Rules, and there is none. Thus, in the only published case *factually* on all fours with this case, the Fifth Circuit concluded, as did the Ninth Circuit here, that it was just and practicable to apply the 1995 amended rules regarding filing of post-trial motions to a matter pending on appeal at the time of the amendments. *See Long*, 77 F.3d at 879.

7. Schudel proposes that the case was not really "pending." (Hopkins Pet. at 15-17; Schudel Pet. at 16-17.) This odd argument finds no support in this Court's enabling Order and defies the record. The district court and then the court of appeals accepted jurisdiction over the case. No party contests that fact. Consequently, the court of appeals had the discretion to apply the amended rules to the case before it. *E.g.*, *Barber*, 34 F.3d at 1273-74 (applying amendments to case pending on appeal); *Long*, 77 F.3d at 879 (same); *Burt*, 14 F.3d at 257-60 (same); *Skoczylas*, 961 F.2d at 544-46 (same); *Ford*, 32 F.3d at 933-34 (same); *Garcia*, 20 F.3d at 6009 (same); *Cleveland*, 38 F.3d at 289 (same); *Duke*, 50 F.3d at 574-76 (same); *Schroeder*, 41 F.3d at 1276-77 (same); *Wallis*, 26 F.3d at 882 (same); *Leader Nat'l Ins. Co.*, 19 F.3d at 445 (same); *Cole*, 43 F.3d at 1385-86 (same); *Hill*, 961 F.2d at 156 (same); *Narey*, 32 F.3d at 1524 (same); *Virgo*, 30 F.3d at 1355 (same); *Barbour*, 48 F.3d at 1270 (same); *cf. Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 836-37 (1990) (appellate court may apply amendments to the law in the first instance "if, 'by its terms,' the law was to be applied to pending cases").

8. Schudel next proposes a collage of possible explanations for why the application of the amendments here was

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amendments. Nor did Schudel seek leave to file anything even after the court of appeals addressed the amendments at oral argument.

not "just or practicable." (Hopkins Pet. at 17-25; Schudel Pet. at 15-18.) Schudel misconceives the import of cases such as *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871 (1997), *Chenault v. United States Postal Serv.*, 37 F.3d 535 (CA9 1994), and *United States v. 51 Pieces of Real Property*, 17 F.3d 1306 (CA10 1994), none of which involved the Federal Rules. Those cases re-stated the time-honored principle that a new law which impairs vested rights should not be given retroactive effect absent a clear indication in the law to the contrary. In this case, the enabling Order *expressly* allows application of the amended Rules to pending cases. Further, Schudel had no substantive vested right, impaired or otherwise. More precisely, "[n]o one has a vested right in any given mode of procedure." *Ex parte Collett*, 337 U.S. 55, 71 (1949) (quoting *Crane v. Hahlo*, 528 U.S. 142 (1922)).[11]

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[11] Schudel's arguments about the need for "finality" and the importance of "vested rights," (Hopkins Pet. at 20-25; Schudel Pet. at 16-17), in any event spurn the record and fail to address the considerations given by the courts below. The district court accepted General Electric's timely-filed post-trial papers and ruled, correctly, that Schudel had secured a verdict only by relying on a slate of improper and grossly tainted evidence. The court of appeals went even further, finding that a majority of the limited evidence the district court had ultimately found admissible was itself improper and unreliable. Schudel would have his improperly-secured verdicts reinstated by insisting on application of a now-defunct procedural rule. Schudel's equities-based arguments on what is "just and practicable" cannot stand the slightest scrutiny.

Moreover, Schudel's equity argument is baffling even under the old version of Rule 50. He would have General Electric forfeit its right to appeal because, when General Electric timely-filed its post-trial motions, it extended the courtesy of service by overnight mail rather than postal delivery. Schudel's protests aside, there is no innate or constitutional right to service by postal delivery. Indeed, service rules are frequently revised. *See, e.g.*, Fed. Rs. App. P. 25, 26 (1996) (referencing service by commercial carrier); Fed. R. Civ. P. 4 (1995) (same); *see generally* 28 U.S.C. § 2071 (1997) (authorizing district court rulemaking); Fed. R. Civ. P. 83 (same).

9. Finally, General Electric observes that even if the Court saw fit to grant *certiorari* and ultimately determined that the amendments to federal rules may not be applied to pending cases, the ruling would be of doubtful consequence to this case. As General Electric argued in the proceedings below, its post-trial filings, made on the tenth day after entry of judgment and served that day by Federal Express, were proper for several reasons even under the old Federal Rule of Civil Procedure 50 (requiring filing and service within 10 days of judgment): First, Federal Express is indeed the legal and practical equivalent of mail.[12] Second, all parties had consented to service by Federal Express by engaging in service by Federal Express or other alternatives to postal delivery throughout the extensive litigation.[13] Third, lead trial counsel had assumed representation of all plaintiffs, and she had been served by hand-delivery.[14] Any one of those considera-

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[12] *See generally* 18 U.S.C. §§ 1693-1699, 1729 (1982); 39 U.S.C. §§ 601-606 (1982); 39 C.F.R. Parts 310, 320 (1995); 44 Fed. Reg. 61,181 (Oct. 24, 1979) (suspending Private Express restrictions for carriage of express mail or overnight service). Further, as the district court noted and the comments to the newly-amended Federal Rules of Appellate Procedure observe, parties reasonably may expect private express mail delivery to be more prompt and more reliable than postal delivery. *See* Pet. App. at 21; Fed. Rs. App. P. 25, 26 (comments). Those expectations of course were realized here; Schudel's service copies were delivered overnight.

[13] *See, e.g., Magnusen v. Video Yesteryear*, 85 F.3d 1424, 1431 (CA9 1996) (parties' course of conduct may validate mode of service); *Salley v. Board of Governors, University of North Carolina, Chapel Hill, N.C.*, 136 F.R.D. 417 (MDNC 1991) (same).

[14] General Electric noted that lead trial counsel had signed pleadings on behalf of all plaintiffs, had presented many of the plaintiffs on direct testimony at trial, and had otherwise acted as common counsel. *See, e.g.*, Wash. (E.D.) L.R. 1.2(d)(1) ("filing of any pleading shall constitute an appearance by the attorney who signs the pleading"). Although General Electric always extended courtesy service to all counsel, under the Rules General Electric was required to serve only lead trial counsel, which it did. *See, e.g., Buchanan v. Sherrill*, 51 F.3d 227, 228 (CA10 1995) (rules do not require

tions is enough to defeat Schudel's no-service-by-Federal-Express-overnight-mail complaint, quite apart from any question of the proper application of the 1995 amendments in this case.

The court of appeals did not reach General Electric's alternative arguments, or remand to the district court for further findings, or decide the question of whether service had been effected. It did not need to do so; the amendments to the Federal Rules mooted the inquiry. Thus, although the court of appeals—citing its then-new opinion in *Magnusen v. Video Yesteryear*, 85 F.3d 1424 (CA9 1996)—noted in *dicta* its opinion that delivery by Federal Express did not satisfy mail delivery requirements in the Ninth Circuit, it never "concluded that the attempt to serve Hopkins . . . was ineffective and therefore untimely," (Hopkins Pet. at 2 n.1, 9), or that General Electric's post-trial motions were "untimely," (Schudel Pet. at 10). Indeed, to make such a determination even under *Magnusen*, the courts below would have had to determine, *inter alia*, whether the parties' course of conduct permitted service by Federal Express. 85 F.3d at 1431. No such inquiry was undertaken or needed in light of the Rule amendments.

10. As is the case with their *Daubert*-based arguments, petitioners' arguments on application of the Federal Rules pose nothing new or worthy of this Court's extraordinary *certiorari* jurisdiction. The court of appeals applied the usual principles of interpretation, and its unanimous decision does not conflict with any decision of this Court or any other court. *See Roberts*, 88 F.3d at 878 (noting "consistent" interpretation of the effective date provisos of the amendments). Further, when it issued its decision, the court of appeals was acting on the discretion expressly granted to it by this Court.

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service on each of several counsel appearing on behalf of a party); *Daniel Int'l Corp. v. Fishbach & Moore, Inc.*, 916 F.2d 1061, 1063 (CA5 1990) (same).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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